Editor's note: Reconsideration granted; decision vacated in part by order dated Sept. 17, 1982 -- See 66 IBLA 76A & B below; appealed - aff'd, Civ.No. 82-1389 (D. Idaho); aff'd, No. 84-3835 (9th Cir. April 2, 1985) 756 F.2d 1410

R. JAY KIDD

IBLA 81-158 Decided July 29, 1982

Appeal from decision of the Idaho State Office, Bureau of Land Management, rejecting desert land entry application. I-16137.

Affirmed as modified; case files remanded with instructions.

1. Desert Land Entry: Generally--Desert Land Entry: Applications

   An application for a desert land entry which is not accompanied by the statements of two credible witnesses as required by 43 U.S.C. § 322 (1976), is not properly executed under 43 CFR 2521.2 and is properly rejected as incomplete. Where the application has been filed in a competing situation pursuant to a simultaneous filing, the application may not be corrected and loses its priority in favor of the second drawn application.

2. Administrative Practice--Board of Land Appeals--Rules of Practice: Appeals: Generally

   Upon assuming jurisdiction of an appeal, the Board of Land Appeals has full authority to consider the entire record in making a decision, and its review is not limited to the theories of law upon which the parties have proceeded.

APPEARANCES: James Annest, Esq., Burly, Idaho, for appellant; Lawrence H. Duffin, Esq., Burley, Idaho, for adverse party, Henry W. Manning.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

R. Jay Kidd has appealed from the October 20, 1980, decision of the Idaho State Office, Bureau of Land Management (BLM), rejecting his desert land entry application I-16137, for 200 acres of land described as parcel "A," SE 1/4, SE 1/4, NE 1/4, sec. 33, T. 9 S., R. 25 E., Boise meridian. The application was rejected because it was not complete.

The application was originally filed in the State Office October 26, 1979, in response to a notice dated September 20, 1979, published at 44 FR 55667 (Sept. 27, 1979), which opened two parcels to entry under the Desert Land Act and revoked a previous "initial decision" of September 7, 1978, classifying the two parcels as unsuitable for desert land entry. The order also stated that: "All valid applications received between the date of publication of this notice and 10:00 a.m. on October 29, 1979, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing."

The record shows that 78 applications were considered simultaneously received for parcel "A." All applicants were notified by letter of September 16, 1980, from BLM that a drawing would be held October 16, 1980, to resolve the conflicts of these applications and to establish the order in which the applications would be considered in accordance with 43 CFR 295.8 (currently 43 CFR 1821.2-3). The notice specifically pointed out:

> Many of the applications are incomplete, do not correctly describe the lands, and do not contain required certifications. These applications will be included in the drawing; however, they will not gain a priority of filing over fully completed, properly filed applications for the same lands.

At the drawing held October 16, 1980, R. Jay Kidd's application was drawn with first priority. The decision appealed from, rejected his as incomplete for the following reason:

> The application must have two or more credible witnesses stating where the land is situated (Act of March 3, 1877, 19 Stat. 377; 43 U.S.C. 322). Mr. Kidd's application had only one witness completing both witness forms. Thus, his application is deficient, and he thereby loses his priority of filing.

The decision also stated that the completed application (I 16170) of Henry Manning respondent herein, was the second drawn, and would be given first priority for the desert land entry.

Appellant contends in his statement of reasons that he has substantially complied with all relevant statutes in his application. He explains that he inadvertently submitted two affidavits from the same person with his application. He asserts that the information from the statement of two witnesses as to the character of the applied for land required by 43 U.S.C. § 322 (1976) was unnecessary. He contends the same information was already within the knowledge of BLM personnel because of the exhaustive examination and research in the development of the desert land classification and because of the affidavits of all the other conflicting applicants. Manning filed an answer, and subsequently appellant requested a fact-finding hearing. We have reviewed the record and find that a fact-finding hearing is not warranted, and the request is, therefore, denied.

[1] Contrary to appellant's belief, his failure to complete his application by submitting the statements of two witnesses as required by 43 U.S.C.

§ 322 (1976), and the governing regulations, 43 CFR 2521.2, provided an adequate basis for rejection of his application. Appellant admits the deficiency in the application, but attempts minimize its importance by claiming this statement would have merely duplicated known known information of record. Such rationale does not alter the fact that appellant has failed to properly comply with the legal requirements for a satisfactory desert land entry application, while many other applicants competing for the same land did provide complete applications.

43 U.S.C. § 322 (1976) specifically provides in pertinent part:

> All lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of sections 321-323, 325 and 327-329 of this title, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

43 CFR 2521.2 governing the requirement applications provides:

> (a) Filing and fees. (1) A person who desires to enter public lands under the desert land laws must file an application * * * on forms approved by the Director, properly executed. * * *
>
> (b) Post-office addresses of applicants and witnesses. Applicants and witnesses must in all cases state their places of actual residence, their business or occupation, and their post-office addresses. It is not sufficient to name only the county or State in which a person lives, but the town or city must be named also; and where the residence is in a city the street and number must be given. [Emphasis added.]

This Board has taken the position that desert land entry applications should not be rejected for minor or insignificant deficiencies. We have specifically noted that no application should be summarily rejected for error unless the error or omission relates to information expressly and specifically required to be furnished and is of such significance that it would preclude favorable consideration. William J. Hart, 30 IBLA 138 (1977).

Witness statements, specifically required by the law, are an integral part of a properly executed application. Appellant was given adequate notice of this requirement in the general instructions in the application. 1/

1/ Instruction No. 5 specifically states: "The application and statements of witnesses must be signed and filed in the proper BLM State Office in which the land is located." Instruction No. 6 states, "The statements on this form must be completed and executed by each of two (2) competent witnesses."

Moreover, in a similar situation where witness statements had been provided, but only the addresses of the witnesses had been deleted, this Board concluded that such failure of the applicant was an adequate basis to reject the application. William J. Hart, supra.

In an individual filing situation where there is no competing interest, we recognize that this type of deficiency would be considered correctable, and we would allow priority from the time of correction. William J. Hart, supra. However, that is not the situation before us. Appellant's application was knowingly filed in a competing situation under a simultaneous filing procedure where the essential element of the drawing is establishing the priority of the applicants, 43 CFR 1821.2-3. Under this system, the rights of the second priority applicant attach eo instante, and granting a first priority applicant any lattitude would infringe upon those rights. Accordingly, BLM properly denied appellant priority in favor of the second drawn application. See Nalon Taylor, 48 IBLA 336 (1980); Patricia Manning, 48 IBLA 244 (1980); Stephen E. Bellem, 48 IBLA 5 (1980).

[2] Upon assuming jurisdiction of an appeal, the Board of Land Appeals, as the authorized representative of the Secretary of the Interior, exercises his authority to consider the entire record when it makes a decision and its review is not limited to the theories of law upon which the parties have proceeded theretofore. United States v. Elbert Gassaway, 43 IBLA 382 (1979). While BLM states that the second drawn application was complete, our review of the Manning case file indicates that this is not the case. Specifically, both witness statements submitted with the application fail to list a street address as required by 43 CFR 2521.2(b). Such a deficiency in the application is a proper basis for rejection. See William J. Hart, supra. Since the Manning application was not completed in accordance with the regulation, he, like Kidd, loses priority, and BLM should proceed to adjudicate the next drawn application.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified, and case files remanded for further action not inconsistent herewith.

Gail M. Frazier
Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI DISSENTING:

The majority affirms rejection of appellant's application to make entry under the Desert Land Act, 43 U.S.C. § 321 (1976), because of the failure to file two witness statements as required by 43 U.S.C. § 322 (1976), and applicable regulations. Since it is my view that 43 U.S.C. § 322 (1976) does not apply and, thus, failure to submit the witness statements does not result in automatic loss of priority, I respectfully dissent.

The statute involved is a combination of sections 2 and 3 of the original Desert Land Act, Act of March 3, 1877. It defines desert lands as excluding timber and mineral lands but embracing lands which will not, absent irrigation, produce agricultural crops, "which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract may be situated." The section goes on to say that the determination of what is desert land is subject to the decision and regulation of the Secretary of the Interior.

Needless to say, the Desert Land Act was passed at a time when all lands of the United States, save those expressly withdrawn and reserved, were open to entry, settlement, and location. Historically, a major source of adjudication within the Department has involved conflicting claims to land based on different statutory schemes--the most common being those between mineral locators and agricultural entrymen. Considering the vast expanse of public land at that time and the small number of General Land Office employees it was natural that the Department relied, to a certain extent, on the certification of disinterested parties as to the nature of the land claimed. These types of witness statements were required not only under the desert land laws but under the homestead laws (see 43 U.S.C. § 251 (1976)), and the mining laws (see 30 U.S.C. § 29 (1976)), as well.

The situation changed radically, however, subsequent to the passage of the Taylor Grazing Act, Act of June 28, 1924, 43 U.S.C. § 315 (1976). Under the provisions of section 7 of that Act, virtually all land in the lower 48 states (the Act was never applicable in Alaska) was withdrawn for classification. Now, no entry under any law may be allowed unless the land has first been classified as suitable for such disposition.

Where the land has already been classified as suitable for disposal or use, prospective applicants may file their applications without more. Where, however, the land has not been so classified, the Department has established a petition/application system whereby individuals may petition to have the land classified as suitable for the desired use and apply for the grant of the use. The regulations concerning this procedure are found on 43 CFR Part 2450. No petition for classification need be filed where the land is already classified as suitable for desert land entry. 43 CFR 2521.2(a)(1).

Where the land has not been classified as suitable for desert entry, I agree that the statutory requirement of 43 U.S.C. § 321 (1976) applies. Indeed, the witness statements may, in certain cases, provide sufficient information to alter a prior classification. Where this occurs, the petitioner applicant is afforded a priority right to make entry. See 43 CFR 2450.3(b)(1) and (2). Where, however, the classification is the result of

Bureau motion, a decision issues establishing a period of time in which any interested individuals may make application, and all applications received within the time period are considered to be simultaneously filed. 43 CFR 2450.3(c). This latter procedure was utilized in the instant case.

Thus, in this case, the Secretary has already classified the land as suitable for disposal under the desert land laws. It would seem that the purpose of 43 U.S.C. § 322 (1976), has been accomplished. The filing of witness statements in this case is an exercise in irrelevancy. The law should not, and, I believe, does not require the performance of useless and unnecessary tasks.

I recognize that the application form and, therefore, arguably by reference, the regulations (43 CFR 2521.2(a)(1)) specifically advert to the need to file two witness statements. 1/ But, as was stated in a different context in Nelda E. McAndrew, 24 IBLA 205 (1976), "no application should be summarily rejected for error unless the error or omission relates to information expressly and specifically required to be furnished and is of such significance that it would preclude favorable consideration." Id. at 208 (concurring opinion). See also William J. Hart, 30 IBLA 138 (1977). While the factual situations in those cases were different, I think the principle is of more general application. Since the Secretary has already determined the land is suitable for entry under the desert land laws, I scarcely see how the witness statements are "of such significance" so as to preclude favorable consideration. Nor do I see the existence of third parties as a bar to relief. Where a requirement neither establishes an applicant's qualifications nor benefits any other Governmental interest, failure to comply therewith should not be invoked against any applicant so as to deprive the individual of a statutory preference right. Cf. Harry Ruch, 27 IBLA 123, 125-26 (1976).

Since, however, the majority has determined to nevertheless rigidly apply the witness statement requirements I agree that the second priority applicant has an equally fatal flaw. For my part, however, I would prefer to limit our enforcement to those requirements that have at least an arguable basis in reality. I would grant the instant appeal.

James L. Burski
Administrative Judge

1/ I would read the rather cryptic reference to the addresses of witnesses in 43 CFR 2521.2(b) as applying only where the need to file witness statements arise, viz., where the land has not yet been classified as suitable for desert land entry.

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IBLA 81-158, 66 IBLA 71	:	Desert Land Entry
	:	
R. JAY KIDD :	:	16137
	:	
	:	Petition for Reconsideration
	:	Granted, Decision Vacated in
	:	Part; Case remanded in Part

ORDER

On August 31, 1982, Henry W. Manning, adverse party in the above captioned appeal, filed a Petition for Reconsideration of that part of our decision, issued July 29, 1982 in R. Jay Kidd, 66 IBLA 71 (1982) which held that his second priority application under the Desert Land Entry Act was rejected because the witness statements submitted with his application failed to list a street address as required by 43 CFR 2521.2(b).

In his petition for reconsideration, Manning states that the witnesses who signed his application did not live in a city and did not have street addresses. Included with his petition are affidavits of his witnesses, John Doyle Manning and Wint Maxey which state that they live in a rural area, that they receive their mail through the Post Office and do not have street addresses.

The applicable rejection 43 CFR 2521.2(b) provides:

> Post-office addresses of applicants and witnesses. Applicants and witnesses must in all cases state their places of actual residence, their business or occupation, and their post-office addresses. It is not sufficient to name only the county or State in which a person lives, but the town or city must be named also; and where the residence is in a city the street and number must be given.

The regulation specifically requires that a complete address be supplied. Both witnesses on the Manning application listed only the as their address. Based on their affidavits that they city and state live in a rural area, receive their mail through the Post Office and do not have street addresses, the case will be remanded to BLM to determine initially whether each witness in fact listed his complete address. If

it is determined that the witnesses addresses are complete, BLM should proceed to process the Manning application. If however BLM concludes that the addresses are deficient, BLM should reject the application and notify the applicant of his right to appeal to this Board.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Petition for Reconsideration is granted, our decision on J. Ray Kidd, supra, is vacated in part and the case remanded in part to BLM for further consideration.

Gail M. Frazier
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

James L. Burski
Administrative Judge

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